Supreme Court, U.S.
FILED
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No. 04 452

IN THE

SUPREME COURT OF THE UNITED STATES

RENE' J. CLINTON,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

On Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit Erred in holding that in the absence of a motion for direct verdict, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal. The petitioner orally moved for a mistrial and was denied.

LIST OF PARTIES

The parties to the proceeding below are the Petitioner-Plaintiff, Rene J. Clinton and the Respondent-Defendant, The City of Atlanta. There are no other parties.

RULE 29.6 STATEMENT

Petitioner is not a corporation, it is an individual.

RELATED CASES

The United States Court of Appeals for the Eleventh Circuit decision in this case was based upon Coughlin v. Capitol Cement Co., 571 F. 2d 290, 297 (5th Cir. 1978).

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PETITION FOR WRIT OF CERTIORARI

Petitioner-Plaintiff, Rene J. Clinton, respectfully petitions for a writ of certiorari to review the June 30, 2004, decision of the United States Court of Appeals for the Eleventh Circuit in the above-entitled proceeding finding that, in the absence of a motion for directed verdict, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal. Petitioner orally moved for a mistrial and was denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Northern District of Georgia and the opinion of the United States Court of Appeals are reproduced in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered on June 30, 2004. This petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

(I) Educational Background

In June 1988, Petitioner obtained an Associate degree in Civil Engineering Technology from the University of Cincinnati, A Bachelor of Science degree in Civil Engineering Technology from the Southern Polytechnic State University, and a Master degree in Technical Management from the Southern Polytechnic State University. [Petitioner's Exhibit 40].

(II) Petitioner's Employment and Injury History

In November 1984, the Petitioner was employed by the City of Atlanta as a Civil Engineer II in the Technical Services Division of the Public Works Department's Bureau of Highways and Streets. [Petitioner's Exhibit 21]. And, Petitioner worked under the direct supervision of Mr. Lance Clark [hereinafter "Clark"] for approximately ten months until August 1985. During the ten months period, Mr. Clark evaluated the Petitioner two times, in January 1985 and March 1985 during Petitioner's new hired probationary period where he checked Petitioner was performing satisfactory in every category of the assessment. The only official evaluations and assessments by the Respondent of the Petitioner's performance, rate Petitioner's performance as satisfactory and above. [Petitioner's Exhibits 13 & 14].

Petitioner's performance evaluation reports covered the periods from November 8, 1984 to January 4, 1985 and November 8, 1984 to March 1985 respectively. It is fair to say that these reports reflects Mr. Clark's assessment and evaluation of Petitioner's performance during the periods she carried out

assignments in his division. Petitioner's "Job knowledge" is satisfactory on both reports. Job knowledge implies, "employee knows what to do and how to do it without assignments in his division." Id. Petitioner's "work quantity and work quality" were also graded satisfactory in her performance evaluation reports.

Mr. Clark is the only supervisor who ever evaluated and assessed Petitioner's job performance while in the employ of the Respondent. The official record of the Department was made when Mr. Clark was the immediate supervisor of Petitioner. These two performances evaluations given in January 1985 and March 1985 respectively by Mr. Clark, the absence of any corroborating evidence, such as performance evaluation reports, disciplinary actions taken against Petitioner while in the employed of the Respondent or warning letters to substantiate its proffered nondiscriminatory reasons for not rehiring the Petitioner.

In September 1985, Petitioner was assigned to the field as the City's consultant for various civil engineering projects through the public Works Departments' Bureau of Highways and Streets for three and one half years prior to her job related automobile accident, May 13, 1988.

On May 13, 1988, Petitioner was injured in an automobile accident while in the course and scope of her employment with the Respondent. Specifically, the Metropolitan Atlanta Rapid Transit Authority (MARTA) bus struck the Petitioner's vehicle from behind at a traffic light. As a result of the accident, petitioner sustained injuries to the neck, lower back, both of her extremities and her left leg. Between May 13, 1988 and March 1989, Petitioner continued to work for the Respondent under excruciating pain from her injuries in her position as a Civil Engineer II.

In March 1989, the Respondent's authorized physician placed the Petitioner on disability leave due to the injuries that she sustained in the accident. Also, Petitioner was placed in the Respondent's Workers' Compensation program in March of 1989.

In October 1989, the Respondent's former workers' compensation manager, Linton Harris, (hereinafter "Harris") designated Dr. Gary E. Myerson (hereinafter "Dr. Myerson") as Petitioner's primary treating physician with respect to her injuries. That same month (October 1989), Dr. Myerson diagnosed the petitioner as having a bulging cervical disc and fibromyalgia. [Petitioner's Exhibit 19].

In April 1990, while the Petitioner was still on disability leave and under the care of Dr. Myerson, the Respondent asked that Petitioner submit to an examination by a physician hired by the Respondent, Dr. Fred Allman, and that examination occurred on April 3, 1990. [Petitioner's Exhibit 16]. However, the Respondent terminated Petitioner based on the medical report. Petitioner appealed her termination to the Civil Service Board and was reinstated to her original position of civil engineer II. The Respondent did not want to accommodate Petitioner's disability, and never offered to her the job submitted to Dr. Allman. Instead, in September 1990, the Respondent wrongfully terminated Petitioner from her employment with the City of Atlanta while she was placed on disability leave as a result of the injuries that she sustained from the accident. [Petitioner's Exhibit 40].

In July 1996, the Respondent contracted with National Rehabilitation Services and Ms. Pamela Thiewes (hereinafter "Thiewes") as rehabilitation consultant to provide medical and vocational services to the Petitioner pursuant to the City of Atlanta's workers' compensation insurance program. Ms. Thiewes requested and received the reports of the medical examinations and the

psychological and physical testing from the treating physician, Dr. Myerson and Dr. Tiliakos.(An independent doctor). Based on the medical reports, discussions on the rehabilitation plan began.

In January 1997, the Respondent changed Petitioner's treating physician, Dr. Myerson to Dr. Arnold J. Weil, a physiatrist, as Petitioner's authorized treating physician. During discussions of the individualized rehabilitation plan, Dr. Weil informed the Respondent in writing that there were no mileage limitation restriction imposed on where Petitioner could seek employment. [Ms. Thiewes' Cross-Examination, Tr. Pg. 49, Lines 21-25; Pg. 50, Lines 1-7].

In November 1997, the State Board of workers' Compensation ordered all parties that the Respondent's rehabilitation counselor, Ms. Thiewes, and Petitioner would get and prepare a mutually agreed rehabilitation plan. On November 12, 1997, Ms. Thiewes and Petitioner concluded and signed a mutually agreed Individualized Rehabilitation Plan. [Petitioner's Exhibit 63].

The Agreement stipulated that the rehabilitation counselor (Supplier) would (1) provide job leads of available positions (newspaper ads, phone call information, etc) to Petitioner (the Client). (2) The Supplier will not provide any information regarding resume and cover letters. (3) The Supplier will provide Client with reference materials such as job search, interviewing, marketing, etc. (4) The Supplier and Client will meet every two (2) weeks at Cobb County Public Library to review job leads. (5) Job requirements under the plan includes: [a] job physical demands must be within physical limitations outlined by Dr. Arnold Weil, treating physician as to no lifting or carrying more than 35 pounds; [b] Client desires position with job security, compensation package, promotion opportunity and in the field of storm drainage. (6) The Supplier will

submit job descriptions as supplied by employer, to Dr. Weil for review and approval before initiating employment. The Client will review job description before Dr. Weil review.

Petitioner performed her commitments under the Individualized plan. She submitted one hundred and eight (108) job applications and went on two interviews.[Ms. Thiewes Cross-Examination, Tr. Pg. 53 Lines 13-25]. Ms. Thiewes provided Petitioner with job leads for everywhere but the City of Atlanta. Though Petitioner and Ms. Thiewes were both working and making progress within the terms of the agreed plan, the Respondent without notice to Petitioner, filed an interlocutory order to suspend Petitioner's benefits through the State Board of Workers' Compensation.

On April 14,1998, a hearing was held on the Respondent's motion to suspend Petitioner's benefits. The Administrative Law Judge denied Respondent's motion based on the findings that Petitioner kept her commitment under the plan. However, it was during this hearing that Petitioner discovered the Respondent's contracted agent, Ms. Thiewes, was intentionally withholding information of job leads with the City of Atlanta from her. Ms. Thiewes testified under oath on behalf of the Respondent at the hearing there had been some recent civil engineering job vacancies with the City of Atlanta which she had not disclosed with Petitioner.

In June 1998, Petitioner raised the issue of the Respondent's withholding job leads with the City from Petitioner on Appeal to the Georgia Full Board of Workers' Compensation. In July 1998, the Respondent confirmed in a legal Brief filed in response to Petitioner's appeal, that the Respondent had informed its agent, Ms. Thiewes, that the City was not interested in Petitioner returning to work for the City. Id. In her sworn Affidavit in support of the Respondent's response to Petitioner's charge of disability

discrimination before the Equal Employment Opportunity Commission ("EEOC"), Ms. Thiewes stipulated, "It was my understanding when I began working on Ms. Clinton's case that Ms. Clinton was terminated from the City of Atlanta in 1990. As such, " I was requested to completed job placement within the metropolitan Atlanta area with another employer." Id. [Doc. 9, Petitioner's Exhibit "H"]. In fact, at trial, Ms. Thiewes admitted that Mr. Harris instructed her that the City was not interested in rehiring Petitioner.[Ms. Thiewes Cross-Examination, Tr. Pg. 71, Lines 24-25; Pg. 72, Lines 1-2].

Petitioner was a qualified individual, had a recognized disability, was available and seeking employment as a civil engineer who would require minor accommodation. The Respondent's denial of Petitioner even being given the opportunity of filing an application for a civil engineering job with the City of Atlanta, and the denial of being able to compete with other job applicants via the interview, the process was based on the Respondent's discrimination against Petitioner by reason of her disability in violation of the Americans with Disability Act. At all times Petitioner was ready, willing and able to go to work with the City of Atlanta as a civil engineer.

As a result of the Respondent's instructions to its agent, Ms. Pamela Thiewes, the Respondent denied Petitioner employment opportunities with the City in violation of Title I of the Americans with Disability Act("ADA"), pursuant to 42 U.S.C. § 1983, and the Rehabilitation Act of 1973.

REASON FOR GRANTING THE PETITION

This petition should be granted because Petitioner orally moved for a mistrial to which the trial court denied.

THIS PETITION SHOULD BE GRANTED BECAUSE PETITIONER ORALLY MOVED FOR A MISTRIAL AND WAS DENIED

The Eleventh Circuit Court of Appeals affirmed the Judgment entered on the jury's verdict in favor of the Respondent finding that "in the absence of a motion for directed verdict, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal." The Eleventh Circuit also relied on its ruling in *Couhlin v. Capitol Cement Co.,* 571 F.2d 290, 297 (5th Cir. 1978).[1]

In the instant case, Petitioner argues that the petition should be granted because petitioner orally moved for a mistrial to which the trial court denied. [Petitioner's Excerpt from the Clerk's Record, Docket # 112]. Petitioner timely moved for a mistrial on the ground that the Respondent's attorney's opening statement was highly inflammatory to the jury. Specifically, the Respondent's opening statement set the whole tone and tenor of the trial. She tarred the personality and character of the Petitioner from the very first. Moreover, the Respondent's attorney's prejudicial remarks to the jury during the course of her opening statement prejudiced the jury and deprived the petitioner of a fair trial.

Petitioner timely moved for a mistrial to which the trial court denied. "Making a timely motion for mistrial means making the motion 'when the objectionable words were spoken.'" *Yeatts v.*

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[1] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Commonwealth, 242 Va. 121, 137, 410 S.E .2d 254, 264 (1991) (quoting Reid v. Baumgardner, 217 Va. 769, 774, 232 S.E. 2d 778, 781 (1977)). "A timely motion for a mistrial is required to preserve the issue for appeal even if an objection was properly made to the conduct or comments and improperly overruled by the trial judge." *Morris v. Commonwealth,* 14 Va. App. 283, 287, 416 S.E .2d462, 464 (1992) (en banc).

The Federal Courts of Appeals have jurisdictions over appeals from final decisions of the District Court. A decision becomes final when it ends the litigation on the merits and leaves nothing for the court to do but execute judgment.

In the instant case, petitioner orally moved for a mistrial to which the trial court denied. On September 25, 2003, at the end of trial, the trial court entered a final judgment for the Respondent. Petitioner believed that the judgment was final when the trial court ended the litigation, and was appealable to the Eleventh Circuit because she timely moved orally for a mistrial and was denied.

THIS PETITION SHOULD BE GRANTED BECAUSE THE JURY EFFECTIVELY NULLIFIED THE ADA BY REFUSING TO FIND THAT THE RESPONDENT DID NOT TAKE AN ADVERSE EMPLOYMENT ACTION OF WITHHOLDING INTERNAL JOB VACANCIES FROM THE PETITIONER DURING THE PERIOD FROM NOVEMBER 1997 TO APRIL 1998

The ADA gives civil rights protection to individual with disabilities similar to those provided to individuals based on race,

color, sex, national origin, age and religion. The employment provisions of the ADA apply to private employers, state and local governments, etc., etc. Under the ADA, "no covered entity shall discriminate against a qualify individual with a disability because of the disability of such individual in all employment practices including job application procedure, hiring, firing advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment related activities. (42 U.S.C., § 12101, et. Seq.)

In the instant case, the adverse action was the Respondent's decision-maker, Mr. Harris, instructions to its hired agent, Ms. Thiewes to withhold information regarding available civil engineering positions from which Petitioner was a qualified individual with a disability (QID), As such, Ms. Thiewes denied Petitioner employment opportunities with the City of Atlanta in violation of Title I of the Americans with Disability Act (ADA), pursuant to 42 U.S.C. §1983, and the Rehabilitation Act of 1973.

At trial, Mr. Harris admitted that he instructed Ms. Thiewes that the City was not interested in hiring Petitioner. Id. Also Ms. Thiewes admitted that Mr. Harris instructed her that the City was not interested in rehiring the Petitioner. In addition, Ms. Thiewes admitted in her sworn Affidavit in support of the Respondent's response to Petitioner's charge of disability discrimination before the EEOC that when she began working on Ms. Clinton's case (July 1996) that she was terminated from the City in 1990. "I was requested to complete job placement within the metropolitan Atlanta area with another employer." Id. This is direct evidence of admission by Ms. Thiewes.

THE JURY IGNORED THE OVERWHELMING EVIDENCE THAT PETITIONER DISABILITY WAS NOT A SUBSTANTIAL OR MOTIVATING FACTOR THAT PROMPTED THE RESPONDENT TO TAKE THIS ADVERSE EMPLOYMENT ACTION

The Respondent's nondiscriminatory reasons for not rehiring the Petition because of poor work performance is false. Petitioner worked for the Respondent for three and one half years after her two performance evaluations and never received any warning, reprimand or discipline about her performance. Since the commencement of this litigation, the Respondent has adduced these proffered nondiscriminatory reasons that were never raised, or at least openly so, during Appellant's employment. For example, Mr. Clark, Petitioner's immediate supervisor for approximately ten months rated her satisfactory in every category of her two job performances in January 1985 and April 1985 respectively. [Petitioner's Exhibits 13 & 14].

In fact, the Respondent admitted in the position statement it filed with the EEOC that Appellant's work performance was not a factor in her termination. Id [Doc. 9, Petitioner's Exhibit "h"]. Further, Mr. Harris testified at trial that the Petitioner was offered her job back in 1990. [Mr. Harris Cross-Examination, Tr. Pg. 59, Lines 16-19]. Thus, Petitioner did not have poor work performance as claimed. Moreover, the Respondent's witness, Ms. Thiewes testified that after the completion of Petitioner's medical evaluation with Dr. Tiliakos and Petitioner's functional capacity evaluation (FCE) in November 1996, she sent to Dr. Myerson the results and attached job analysis of the Civil Engineer position specifically for the City of Atlanta in which Petitioner would return.[Ms. Thiewes Cross-Examination, Tr. Pg. 85, Lines 17-25; Pg. 86, Lines 1-5 and lines 11-22]. In fact, Ms. Thiewes read this to the jury.

The record shows that Petitioner was terminated in September 1990 on disability leave and has not returned to work since. In November 1996, the Respondent submitted the job analysis of the Civil Engineer position specifically for the City of Atlanta in which Petitioner would return. Accordingly, the testimony by Respondent's key witness, Ms. Thiewes discredited the Respondent's proffered nondiscriminatory reasons for not rehiring Petitioner because of her previous poor work performance.

On December 9, 1996, Dr. Myerson responded to Ms. Thiewes letter in which he informed her that the job analysis of the Civil Engineer position is not consistent with sedentary and light-duty level, specifically in regards to lifting manhole covers reflecting 25 to 75 pounds. Thereafter, the Respondent requested that Dr. Myerson be changed "due to the lack of appreciable progress." [Ms. Thiewes Cross-Examination, Tr. Pg. 58, Lines 12-21]. Here, the Respondent refused to accommodate Petitioner's disability. As a result, the Respondent instructed Ms. Thiewes "to completed job placement within the metropolitan area with another employer." Id.

Further, the Respondent and Ms. Thiewes, attempted from the beginning to have Petitioner remove from her resume' that she was disabled. Their suggestion was for Petitioner to get her foot in the door by concealment and only disclose her disability at the interview. The Respondent was aware of Petitioner's disability and did not want her to inform potential employers.

Moreover, on October 16, 2000 while the lawsuit was ongoing, the Respondent submitted to Petitioner's newly treating physician, Dr. Arnold J. Weil, the job analysis of the Civil Engineer specifically for the City of Atlanta for his approval. [Petitioner's Exhibits 68 & 68A]. Dr. Weil approved. However, the Respondent never offered Petitioner the job. Instead, the Respondent terminated her disability benefits. [Mr. Harris Direct Examination, Tr. Pg. 38, Lines 15-25; Pg. 39, Lines 1-7].

Simply put, Mr. Harris, the decision-maker, by his own Admission testified at trial, that he instructed Ms. Thiewes that the City was not interested in rehiring Petitioner. Mr. Harris, who was the former City of Atlanta workers' compensation manager, had the motive and intent, because he did not want Petitioner a disabled applicant, working with the City that she may have a recurring disability if the City did not accommodate her disability. As such, The Respondent instructed Ms. Thiewes to complete job placement within the metropolitan Atlanta area with another employer.

The jury must resolve any contradictions or discrepancies in the evidence, even when arising from Petitioner's evidence. Clark v. Bodycombe, 289 N.C. 246- 251 S.E .2d 506, 510 (1976). In this case plain error occurred.

CONCLUSION

Petitioner respectfully requests that this Court grant the petition, review the sufficiency of evidence, reverse the verdict or, in the alternative, grant a mistrial.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

N0. 03-15424
Non-Argument Calendar

D.C. DOCKET No. 99-00338-CV-BBM-1

RENE J. CLINTON,

Plaintiff-Appellant,

versus

CITY OF ATLANTA,
A Municipality,
Atlanta, State of Georgia,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

(June 30, 2004)

Before BIRCH, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

This is the second time we have considered an appeal on this case. In *Rene J. Clinton v. City of Atlanta, et al.*, No. 02-10184 (11th Cir. June 5, 2002), we vacated the district court's grant of summary judgment because factual disputes existed on whether the defendants' proffered nondiscriminatory reasons for taking adverse action against Clinton were pretextual. After remand, the case proceeded to trial.

In the present appeal, appellant Rene J. Clinton appeals *pro se* from the district court's final judgment after a jury verdict in favor of the City of Atlanta ("City"), in her lawsuit alleging a violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12112(a). On appeal, Clinton argues that the evidence presented at trial was such that no reasonable jury could have found that, from November 1997 to April 1998, the City had not taken the adverse employment action of withholding internal job vacancies from her. Clinton also argues that she presented credible evidence from which a reasonable jury could have concluded that the City's proffered, non-discriminatory reason for withholding internal job vacancies, namely, her poor work performance, was a pretext for discrimination based on her disability.

"It is well settled that in the absence of a motion for directed verdict, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal." *Coughlin v. Capitol Cement Co.*, 571 F .2d 290, 297 (5th Cir. 1978). Where a party challenged the legal sufficiency of the evidence on appeal, but failed to move for a directed verdict at the close of all evidence or for a judgment as a matter of law following the return of the verdict, we limit our inquiry to "whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a manifest miscarriage of justice." *Id.* (citations omitted). We have stated that "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Cleveland v. Home Shopping Network, Inc.*, No. 03-11924,

manuscript op. at 7 (11th Cir. May 11, 2004) (quoting *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000)).

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a). Under the ADA, an employer discriminates by, among other things, "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. § 12112(b) (5)(B).

Because the record demonstrates that some evidence existed to suggest that the City withheld internal job vacancies from Clinton due to her poor work performance, and not as a result of her disability, we need not address whether the City's conduct amounted to an adverse employment action. In event, because some evidence supports the jury's verdict, we affirm the judgment entered on the jury's verdict in favor of the City.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RENE J. CLINTON,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	NO. 1:99-CV-0338-BBM
v,	)	
	)	
CITY OF ATLANTA,	)	
	)	
Defendant.	)	

JUDGMENT

This action having come before the court for a trial by jury, and the issues having been tried and the jury having rendered its verdict in favor of the defendant City of Atlanta,

It is Ordered and Adjudged the plaintiff, Rene J. Clinton, taking nothing; that the defendant, City of Atlanta, recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia this 25th day of September, 2003.

LUTHER D. THOMAS
CLERK OF COURT

"s/ Pamela Wright
Pamela Wright
Deputy Clerk

Prepared, filed and entered
In the Clerk's Office
September 15, 2003
Luther D. Thomas
Clerk of Court

"s/Pamela Wright
Pamela Wright
Deputy Clerk